SUPREME COURT OF THE UNITED STATES
October Term, 1973

APR 17 1974
MICHAEL RODAK, JR., CLERK

No. 73-1557

PHILIPO CASAMENTO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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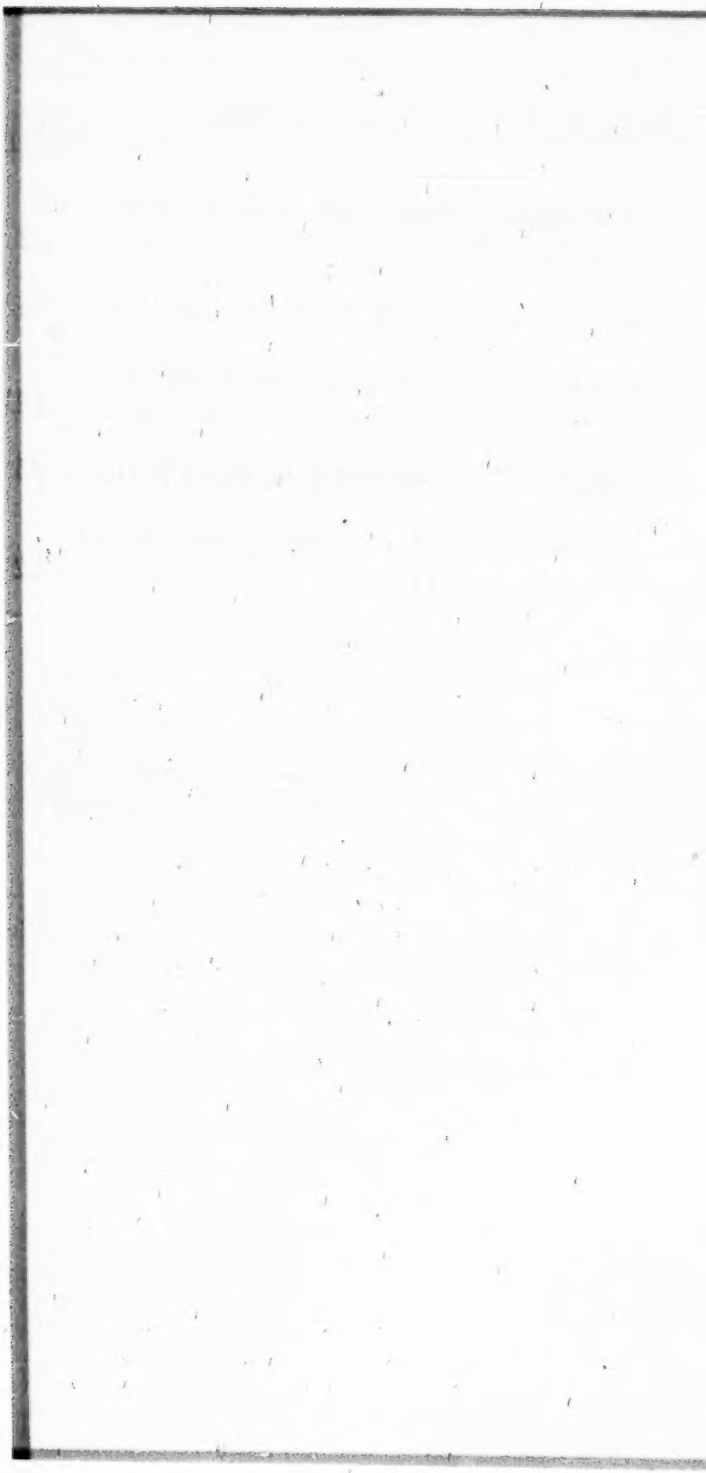

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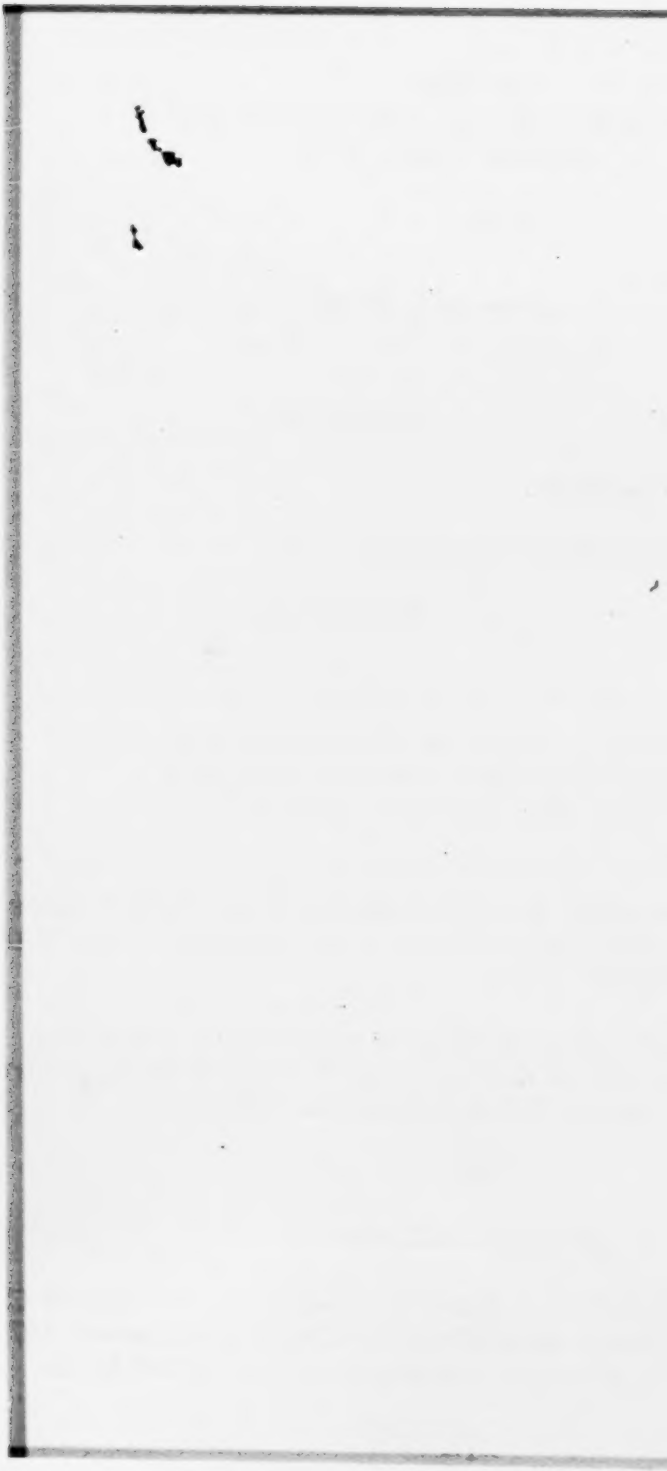
To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second Circuit by judgment entered on the 22nd day of March, 1974, unanimously affirmed a judgment in the United States



District Court for the Southern District of New York convicting petitioner of Conspiracy to Import, Possession and Distribution of Narcotic Drugs, in violation of Title 21 Sections 173, 174, 812, 841 (a)(1),841 (b)(1) (a),952 (a) 960 (a)(1), 960 (b)(1), 963, after trial before District Judge, Murray I. Gurfein and a jury (Indictment No. 73 CR 228). The judgment was unanimously affirmed with opinion.

There were no other opinions written in connection with the case. A copy thereof is annexed hereto as Appendix "A".

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked until Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on March 22, 1974, as aforesaid.

C.

THE QUESTION PRESENTED FOR REVIEW

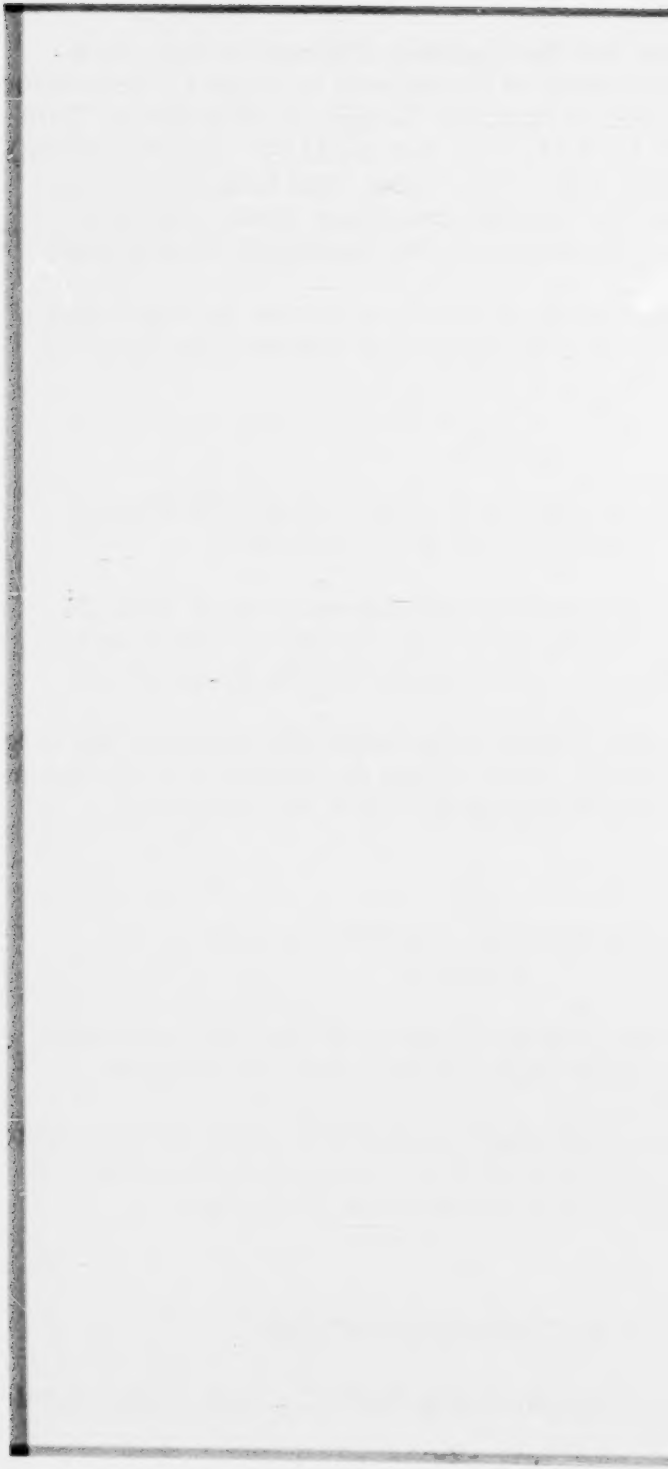
1. Was the evidence adduced at the trial sufficient in law to establish guilt beyond a reasonable doubt.

2. Did the trial court improperly allow the prosecutor to introduce evidence of prior consistent statements to bolster credibility of prosecution witnesses.

D.

STATUTES INVOLVED

The statutes involved are Title 21, U. S. Code, Section



173, 174,812, 841 (a)(1), 841 (b)(1)(a), 952(a) 960 (a)(1), 960(b)(1), 963, each of the foregoing is set forth in Appendix "B" of the petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Statement of the case

Appellant Philipo Casamento was indicted in the United States District Court for the Southern District of New York under Indictment No. 73 CR 228, filed on March 14, 1973.

The indictment contained one count of conspiracy to import, possess and distribute narcotic drugs. Although appellant was named with twelve other co-defendants, he was tried alone.

Trial was held in the United States District Court for the Southern District of New York before Hon. Murray I. Gurfein and a jury commencing on October 12, 1973 convicting appellant as charged.

On December 4, 1973, appellant was sentenced by Judge Gurfein to a prison term of 15 years and a special parole term of 3 years.

Appellant is presently in custody, pursuant to said judgment of conviction, having been remanded following the verdict of the jury.

2. Statement of Facts.

The pertinent facts relating to the evidence against appellant are set forth at length under Point One, infra, and, accordingly, are not reiterated herein.

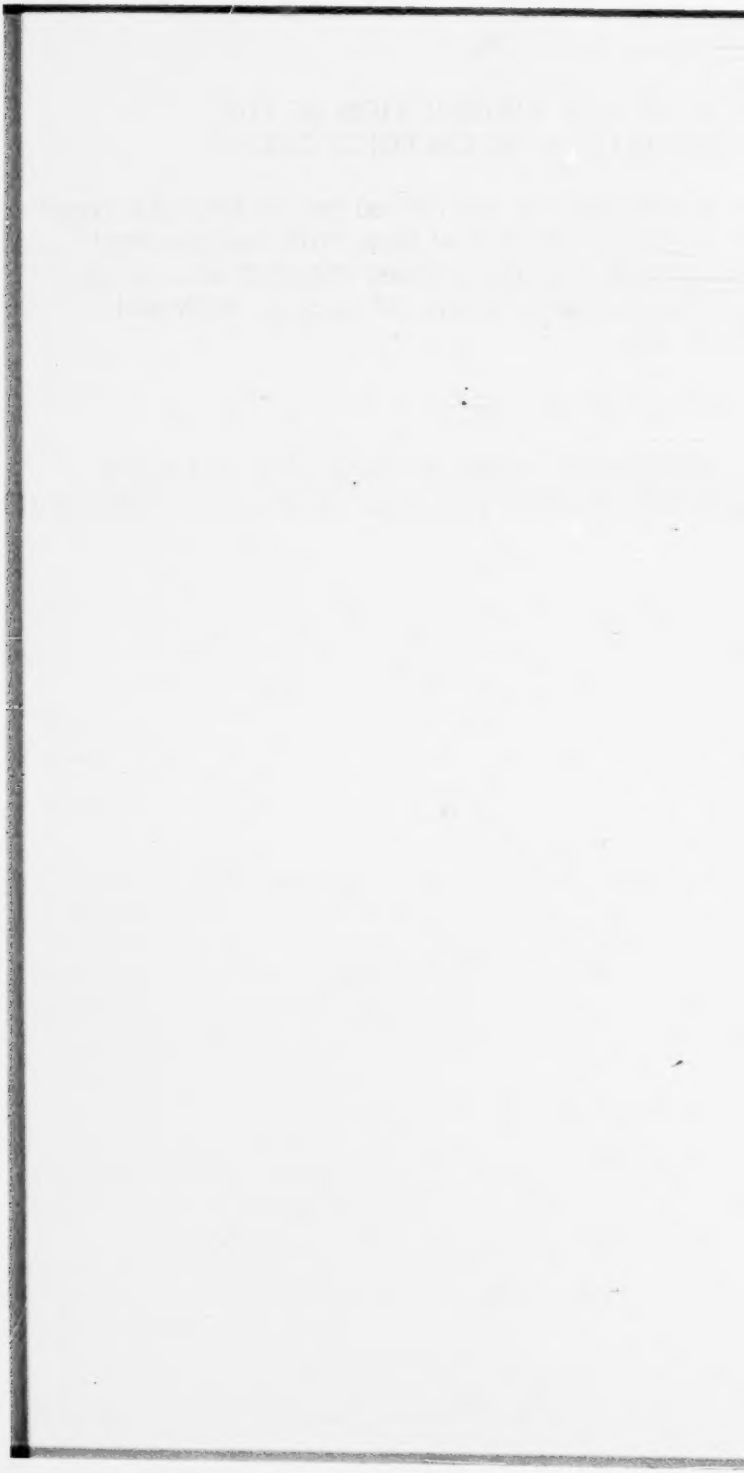
F.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: 18 U. S. C. §659 and 18 U. S. C. §2.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRI



POINT ONE

THE EVIDENCE ADDUCED AT THE TRIAL WAS INSUFFICIENT IN LAW TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT

It is our contention herein that the evidence failed to establish beyond a reasonable doubt that appellant's alleged participation in the transaction was coupled with knowledge that the subject matter was a narcotic drug.

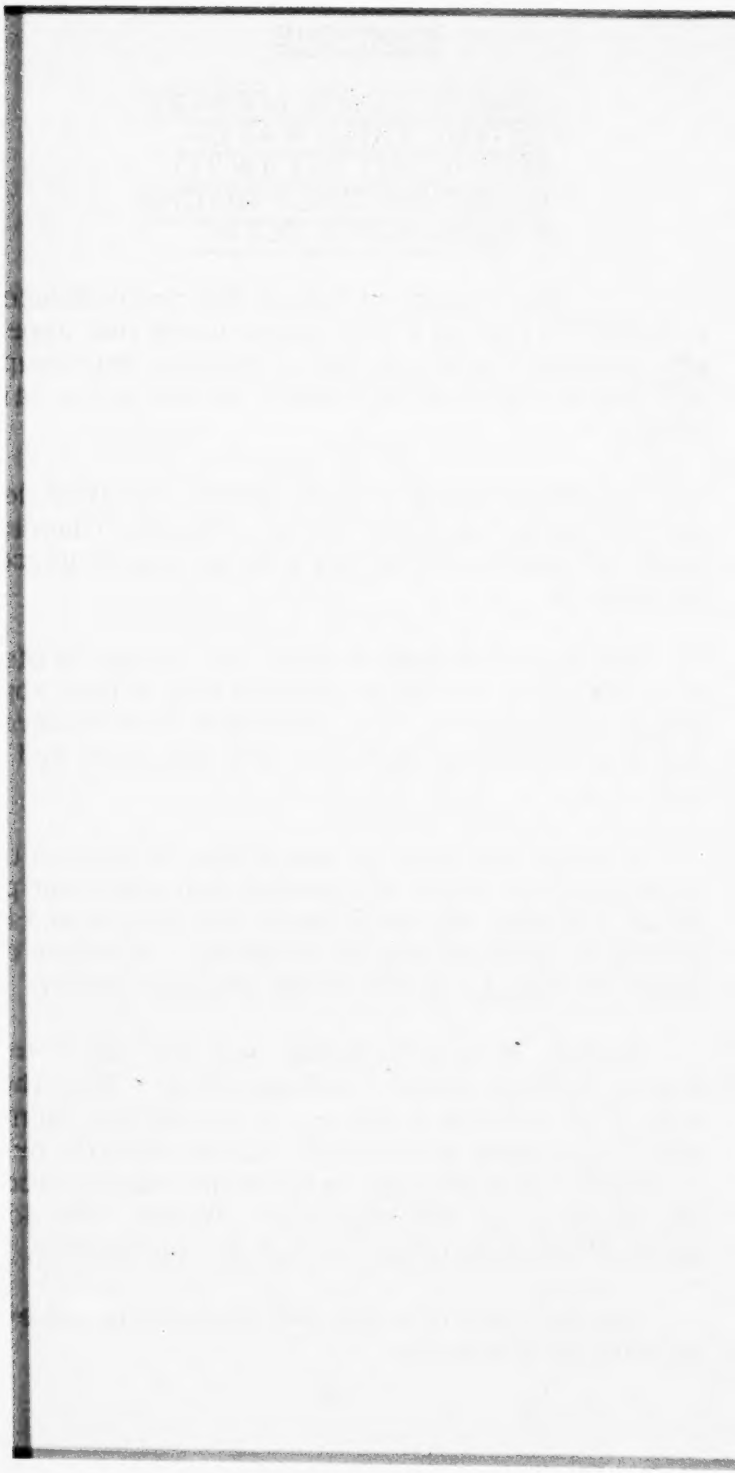
The Government's case against appellant depended almost exclusively upon its key witness, Claude Pastou - a self-admitted courier for a large ring of narcotic smugglers.

Pastou's testimony begins with events of his illicit activities as a narcotics courier long before appellant's alleged involvement. He described in considerable detail how the ring operated over the years and his role in it.

Thus by the time his narrative focused on the single transaction in which he testified that appellant participated, the jury was well aware that Pastou and his confederates were dealing in narcotics. Whether or not appellant also knew this is yet another matter.

Pastou, it must be noted, was the only witness who met or had any contact with appellant. Thus the only source of evidence from which the critical element of knowledge could be derived - either directly or circumstantially - necessarily came from Pastou's account of his involvement with appellant. Pastou, who does not speak English testified through an interpreter.

We turn now to a detailed analysis of the evidence relating to this issue.



The events referring to appellant begin with a conversation in Rio de Janiero between Pastou and a co-conspirator, Lucien Sarti. The latter instructed Pastou to meet another co-conspirator one Michele Nicoli, the following day, to discuss a new customer in New York. Accordingly, Pastou met with Nicoli, who gave him the address of a cheese store in Brooklyn, New York and a description of the person he was to contact there, a man about 40 years old with gray hair and a very pleasant appearance. Pastou was to go there and introduce himself as Roberto.

Upon Pastou's arrival in New York, he spent the night in a hotel room with another co-conspirator, one Leon Petit. Although Pastou had been told by Nicoli to go to the cheese store at 7 o'clock in the morning, Pastou overslept and did not reach the store until 8:30 a. m. The store was still closed when he arrived.

Pastou waited in front of the store walking back and forth. About a half hour later a person meeting the description of the man Nicoli had described, arrived and opened the store. Pastou later stated that this man was the appellant.

Pastou entered the store and said, in Spanish, "I am Roberto". Appellant did not reply in Spanish.

Pastou stated that while he managed to make it understood that he was named Roberto, "particularly we had no discussion or conversation.

Pastou went on to state that while he was capable of conversing in Spanish, Portugese and Brazilian, which had words similar to Italian words, appellant didn't speak Italian but, rather, spoke in some dialect.

Pastou later acknowledged that on the occasion of that first meeting, appellant, other than saying "hello" and "good morning", said "absolutely nothing" to him. They spoke not another word to each other.

At all events, appellant then made a telephone call. Pastou didn't know what was being said. About 15 - 20 minutes thereafter, another man arrived. Pastou learned later that this man was Carlos.

Although Pastou had no conversation with Carlos - "it was impossible" - the trial Court permitted Pastou to testify over objection as to what Carlos made him understand.

Pastou stated that Carlos asked if Pastou had the telephone number to call in Brazil. Pastou then showed Carlos the telephone number of Michele Nicoli in Rio de Janiero. Carlos made Pastou understand to follow him to a car where they drove to various public phone booths. After several unsuccessful attempts, Carlos placed the call to Nicoli. Appellant, did not accompany them, but remained in the store.

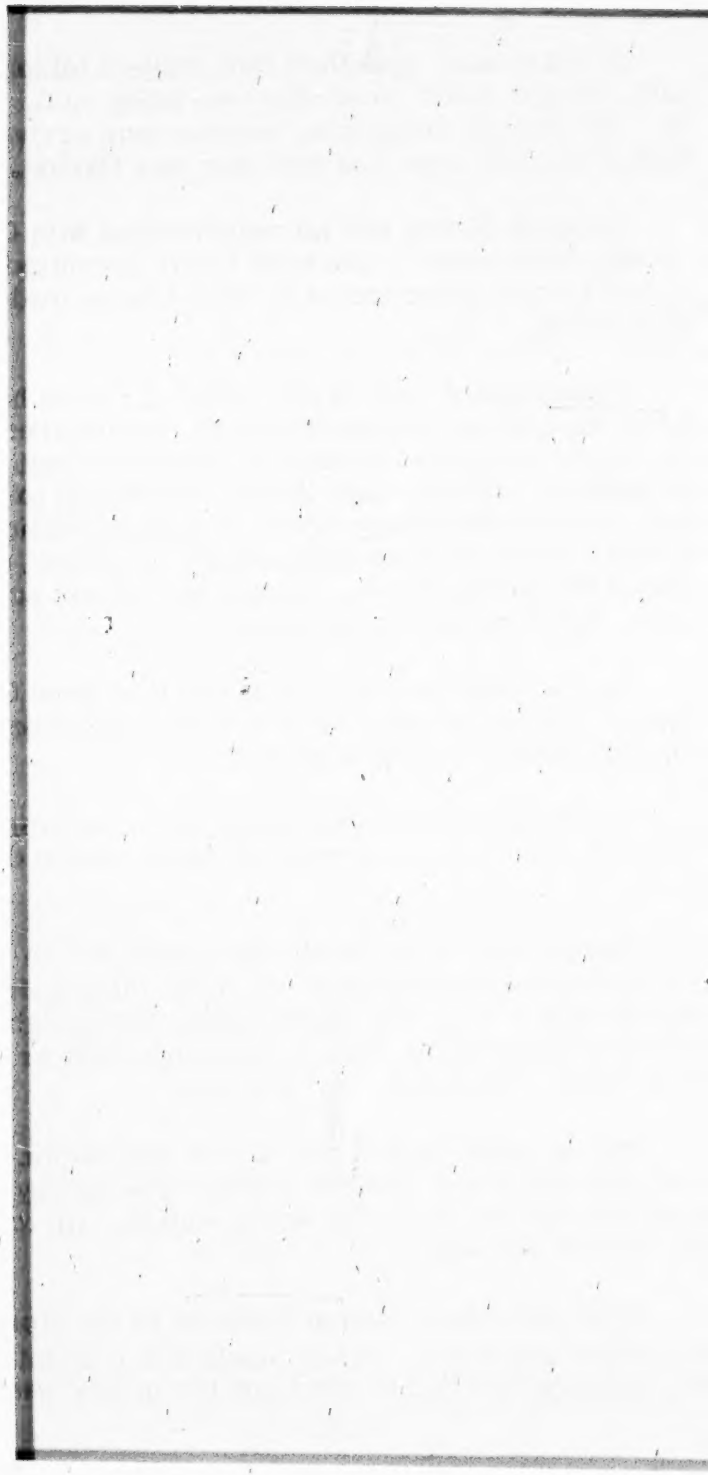
Pastou spoke to Nicoli first and then gave Carlos the phone. Pastou did not hear the conversation because Carlos spoke "in some kind of dialect".

Pastou and Carlos then returned to the store, Carlos and appellant had a conversation which Pastou did not hear.

Pastou went on to testify that although "we really did not have a conversation" he made them understand that he was waiting for merchandise within eight or ten days and would come back to the store eight or ten days later. They told him "it's okay".

Pastou asked how to get back to Manhattan. Appellant told him where the elevated subway was nearby. Pastou then left and got off at the wrong station. He took a cab the rest of the way.

Some days later Pastou returned to the store. Appellant was there. Pastou made him understand that the merchandise had arrived and the money was needed



that day. Appellant said, "yes, okay, si, yeah" and told Pastou to return in the evening, Pastou then left the store.

Pastou returned to the store later that evening. Appellant was in the store. Pastou asked for money. Appellant gave him a paper bag and Pastou left the store.

On the following day, Pastou drove to the cheese store, wherein the following occurred between him and appellant as described by Pastou:

> " I made him understand that I had the merchandise in the car. He came out with me in the street and asked me where was my car. I showed it to him and he made me understand that he was going to take his car and that I had to follow him. "

Pastou went on to relate how he in his car followed appellant in another car until appellant stopped somewhere in the neighborhood of the cheese store. Pastou then stopped behind him. Each opened the trunk of his car and Pastou removed five plywood boxes from his car, each with a capacity of 5 kilos, and handed them to appellant who placed them into the trunk of his own car.

Although Pastou testified that he was told by the man who previously gave him the boxes that they contained heroin, there is no testimony by Pastou that he ever imparted this information to appellant.

After the delivery of the plywood boxes, Pastou gave appellant to understand that he would repeat the transaction the following day. Thereupon, each left the other.

On the following day, Pastou delivered an additional five plywood boxes in the same way as on the preceding day. There was no conversation about money.

The next day Pastou returned to the cheese store and inquired of appellant when payment would be made. Appellant asked for two or three days.

Pastou returned to the store by automobile two or three days later. Appellant and Carlos were both in the back of the store. Pastou asked appellant if he had the money. Appellant said yes. Thereupon Pastou and appellant left the store, and drove around the neighborhood until appellant indicated that Pastou should stop the car. Appellant indicated to Pastou to wait there about 15 - 20 minutes. Appellant took the car and left. He returned about 15 - 20 minutes later and gave Pastou to understand that the money was in the trunk of the car. Pastou thereupon drove appellant back to the store.

After leaving appellant, Pastou picked up Leon Petit whom he had earlier left in a nearby bar, and returned to Petit's hotel room in New York where they opened the suitcase or bag (Pastou couldn't remember which it was) that had been placed in the trunk of the car. The suitcase (or bag) contained $460,000. Pastou took $15,000 as one half his commission and returned to Rio de Janiero a day or two later.

It was upon the foregoing testimony of Pastou that the Government's case against appellant rested. No other witness testified to any other act or declaration of appellant.

We consider now whether the evidence thus adduced was sufficient - if true - to establish that appellant knew he possessed heroin in his dealings with Pastou.

Several basic factors are immediately apparent:

1. The inability of Pastou to discuss the transaction linguistically with appellant leaves the record devoid of any testimony by Pastou that he told appellant that he was there to negotiate a heroin transaction. Similarly, there is nothing in the record to directly indicate that appellant ever said anything to Pastou to indicate that he (appellant) knew that Pastou was dealing in heroin. Pastou invariably used the term "merchandise". Although that word meant heroin to Pastou, there is no evidence that appellant understood it to mean that.

2. On the two days when the plywood boxes were allegedly given to appellant, there is no evidence that there was any discussion with him as to the contents of the boxes or that appellant ever saw the contents.

Thus, there is no direct evidence that appellant knowingly possessed heroin.

We urge further that the circumstantial evidence adduced likewise fails to establish beyond a reasonable doubt that appellant knowingly possessed heroin.

At the first meeting between Pastou and Appellant, there was nothing said by appellant other than "good morning" or "hello". Appellant upon learning that Pastou said his name was Roberto brought Carlos to meet him at the store. This could well have been requested by Carlos without appellant necessarily knowing why. Significantly it is Carlos who then leaves with Pastou and telephones Pastou's confederate in Brazil.

At the next meeting, Pastou informs appellant that the merchandise arrived and money would be

needed that day. Appellant tells Pastou to return later. When Pastou returns, appellant hands him a bag allegedly containing the money. Whether or not appellant was unwittingly accommodating Carlos, cannot be ascertained from the record since the language barrier destroys any possibility of a probative dialogue between appellant and Pastou. The evidentiary situation was - as always - rife with the danger that appellant's concept of what was transpiring was altogether different from what Pastou was in fact doing.

The next two encounters with Pastou - in which the plywood boxes were given to appellant - at best establish only that appellant took possession of the boxes without a single fact from which it could be established beyond a reasonable doubt that he knew what was in them. While Pastou was asked directly if he (Pastou) knew what was in them, and Pastou answered "heroin", no one inquired whether Pastou ever communicated this crucial knowledge to appellant.

Further, the delivery of the money. As at the opening events Carlos was present, so he was present at the final and equally vital closing event. Once again the language barrier left Pastou able only to communicate with appellant sufficiently to work out the physical mechanics of receiving the money but unable to give probative substantive testimony as to what appellant by his acts or declarations knew or understood about the amount that was being delivered or what was being paid for. The fact that Pastou knew or that Carlos knew does not, in these circumstances, satisfactorily establish that appellant knew.

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal."

(U.S. v. Crimmens, C.C.A.N.Y., 123 F. 2d 271,

see U.S. v. Barone, U.S.C.A. Second Circuit, 467 F. 2d 247).

As previously stated there is no direct evidence establishing that the defendant ever knew the nature of the contents of the packages. In Leary v. United States, (1969) 395 U.S. 6, 23 L. Ed 2d 57, 89 S. Ct. 1532 a statutory inference of guilt or knowingly transporting illegally imported marijuana, from the fact of an accused's unexplained possession, was held to deny due process. Although the statutory inference of guilt no longer exists, it is obvious that this is what the jurors considered because of the lack of direct evidence of knowing possession.

Further, from the Court's charge and from the verdict it is almost impossible to determine whether the jury was considering the mere possession or importation and possession of drugs by the defendant. If the conviction of the defendant was for the importation and possession of the drug, there was insufficient evidence to prove beyond a reasonable doubt that the defendant knew of the imporation. It was held in Vacarro v. United States, C. A. Tex., 461 F. 2d (1972) that:

> "...knowledge of imporation of marijuana is an essential element of the offense of possession of marijuana knowing it to have been illegally imported into the United States." (emphasis added)

Therefore, it is submitted that the prosecution failed to prove the defendant's knowledge of two essential elements of the crime charged; first there was insufficient proof that the defendant knew the contents of the packages were drugs and, secondly that there was insufficient evidence to prove that the defendant knew that the goods were imported into the United States.

It is therefore respectfully urged that the Government's proof was insufficient to establish the necessary element of knowledge on the part of the appellant.

POINT TWO

THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE OF PRIOR CONSISTENT STATEMENTS TO BOLSTER THE CREDIBILITY OF PROSECUTION WITNESSES

As already indicated, the Government witness Pastou had by his testimony implicated appellant in the conspiracy charged. On cross-examination, defense counsel sought to impeach Pastou by demonstrating, firstly that Pastou had a motive to falsely implicate appellant in the hope of obtaining leniency for himself in his own case and, secondly that Pastou had previously executed two sworn statements for the Government in each of which he stated that he had delivered the heroin to a man named Frank.

More specifically the cross-examination of Pastou developed the following:

> 1. That he was hopeful that his testimony would be helpful with regard to his sentence and that he knew "that normally by cooperating the sentence would be more lenient."

Thus, there was evidence from which a motive to give false testimony might be inferred.

> 2. Although Pastou gave in-court testimony that he delivered the heroin to appellant Casamento, the defense introduced during cross-examination a prior sworn statement by Pastou (Defendant's exhibit A).

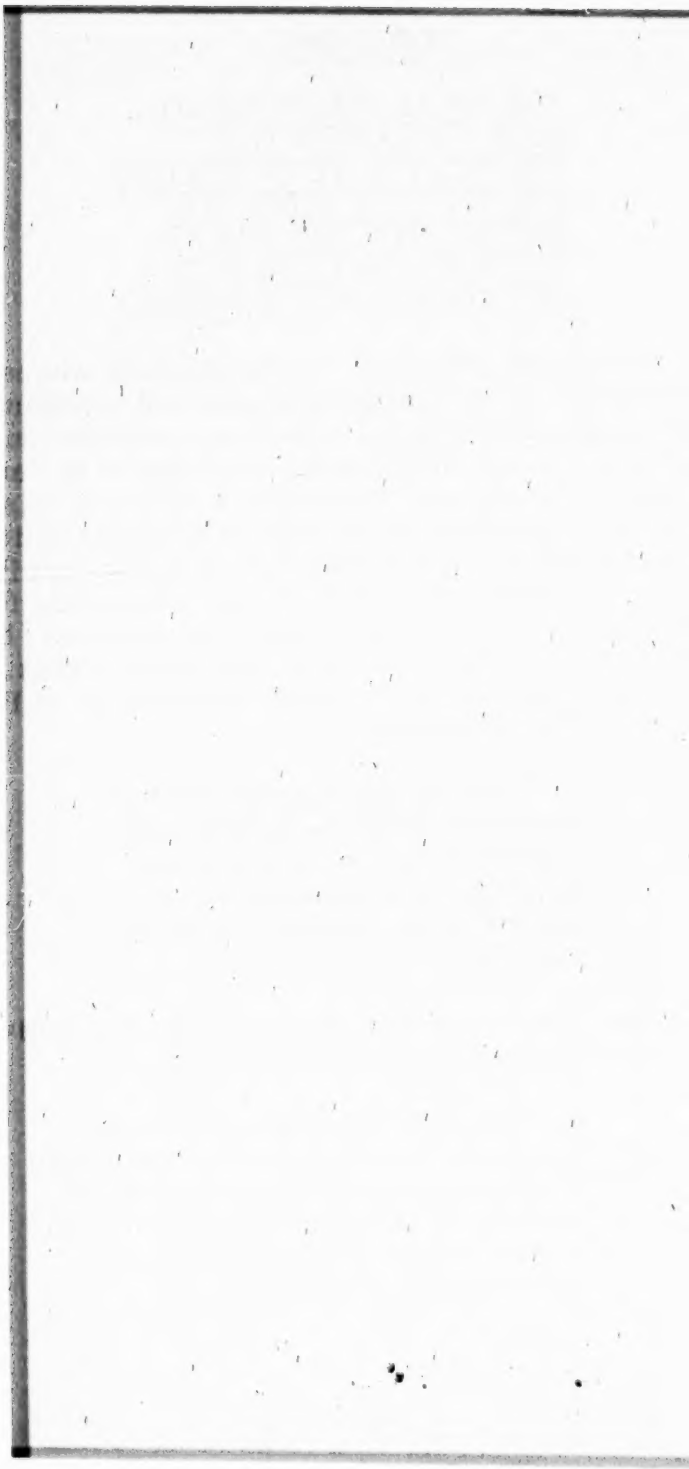


Exhibit A was an affidavit sworn to by Pastou on March 20, 1973, and prepared by the Government for extradition proceedings against one Carlos Zippo, a co-defendant in the case. Zippo was a man with whom Pastou and co-defendant Leon Petit were involved in the narcotics dealings in the instant case.

The affidavit (Exhibit A) was sworn to on March 20, 1973, while Pastou was in custody, cooperating on the third day after his arrival in this Country on November 17, 1972.

A duplicate of Exhibit A, in Haec verba, sworn to previously by Pastou on March 15, 1973 was furnished to defense counsel by the Government, and marked defendant's Exhibit B for indentification.

On cross-examination, Pastou admitted that in paragraph 5 of the affidavit he swore that he delivered the heroin to a man named Frank and that this man named Frank was also the same man who had made the phone call to Brazil. Pastou claimed he had read only the first line.

Pastou had previously testified that although he referred to a "Frank" in the affidavit, he meant the person whom he met in Brooklyn, now known to him as Carlos, and that in any event, Carlos was not appellant

Casamento.

Thus Pastou's testimony was impeached by his prior sworn statement that he delivered the heroin to Carlos (Frank) rather than to appellant.

In an attempt to offset the effect of this development, the prosecutor sought and was granted (over objection) permission to call agent Pavlick to show that Pastou's in-court testimony was consistent with oral statements made by Pastou, prior to the March 1973 affidavit, although after Pastou became a cooperative witness. The following appeas in the record.

"MICHAEL A. PAVLICK, called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. LITTLEFIELD:

Q. Agent Pavlick, could you keep your voice up so that we can hear you all the way across the back of the courtroom here?

A. Yes, sir.

Q. By whom are you employed, please?

A. I'm employed by the United States Department of Justice, Drug Enforcement Administration.

Q. How long have you been so employed?

A. Approximately three and a half years.

Q. Where are you stationed?

A. I'm stationed in New York.

Q. Were you, in late November of 1972 on duty in connection with an investigation of the case which

is now on trial?

A. Yes, sir, I was.

Q. Specifically, were you on duty and dealing with one witness who had become a cooperative witness for the government, Claude Pastou?

A. Yes, sir, I was.

Q. Did there come a time when you accompanied Mr. Pastou to Brooklyn?

A. Yes, sir.

Q. Could you tell the jury exactly what happened in connection with this?

MR. LAROSA: Objection.

THE COURT: Come up, please.
(at the side bar.)

MR. LAROSA; Now we are permitting the government to show prior consistent statements in the form of third party witnesses.

THE COURT: Well, it is not exactly that.

MR. LITTLEFIELD; On the subject of identification, prior consistent statements, the DeSisto case, a whole slew of cases.

THE COURT: What do you want to prove by this witness? Make a tender of proof.

MR. LITTLEFIELD: I want to prove that Pastou told the agents the general description of the area where the cheese shop was and of the man that he

had sold the heroin to.

This agent went out there with Pastou. They found the cheese store, and Pastou pointed to the man standing in the door and said, "That's the person."

In addition, this man showed Pastou over 100 photographs of men roughly the same age of this gentleman, and Pastou was unable to identify any of them as being Casamento, and Casamento's photograph was not included in those photographs.

MR. LAROSA: Now may I be heard?

There has been no attack on identification here. The man pointed to my client and I said he has identified Mr. Casamento. Now, in a guise to attempt to buffet the identification where there has been no attack, they are introducing prior similar statements, and that is all it is. Nothing more than that, and I object to it.

THE COURT: I think this case is a little unusual because of the language difficulty of the witness Pastou, because of the obvious claim that the defense is going to make that: how did he find his way around Brooklyn when he was a stranger, and a number of other things? I think it is an unusual situation.

MR. LAROSA; That is not the claim. The claim of how he spoke to the man has nothing to do with whether he found him or not. His testimony is he showed the address to a cab driver who drove him there. I do not think that could in any way be attacked.

Now we are allowing prior similar statements in an effort to show that there was consistency to it.

THE COURT: Of course, if the defendant should take the stand and deny that he knows him you can bring this in rebuttal.

MR. LAROSA: I agree.

MR. LITTLEFIELD: He denies that he knows whom?

THE COURT: If the defendant takes the stand and denies that he knows Pastou, then obviously you could bring this in rebuttal.

MR. LAROSA: It is proper rebuttal but not on the case.

MR. LITTLEFIELD: There are two exceptions to the general rule of prior consistent statements that are not allowed in, generally not allowed in. Exceptions are: if the defense introduced a motive to lie and the prior consistent statements antedate that motive, than it would be allowed in.

Secondly, it is allowed, these prior consistent statements are allowed in, if they go to the subject of identification, because the court, the Second Circuit, has said in DeSisto that an in-court identification is not a terribly persuasive thing, because the defendant is sitting right there.

So that the point is that the government has the right to show that he has identified him under other circumstances previously, and that is what this is.

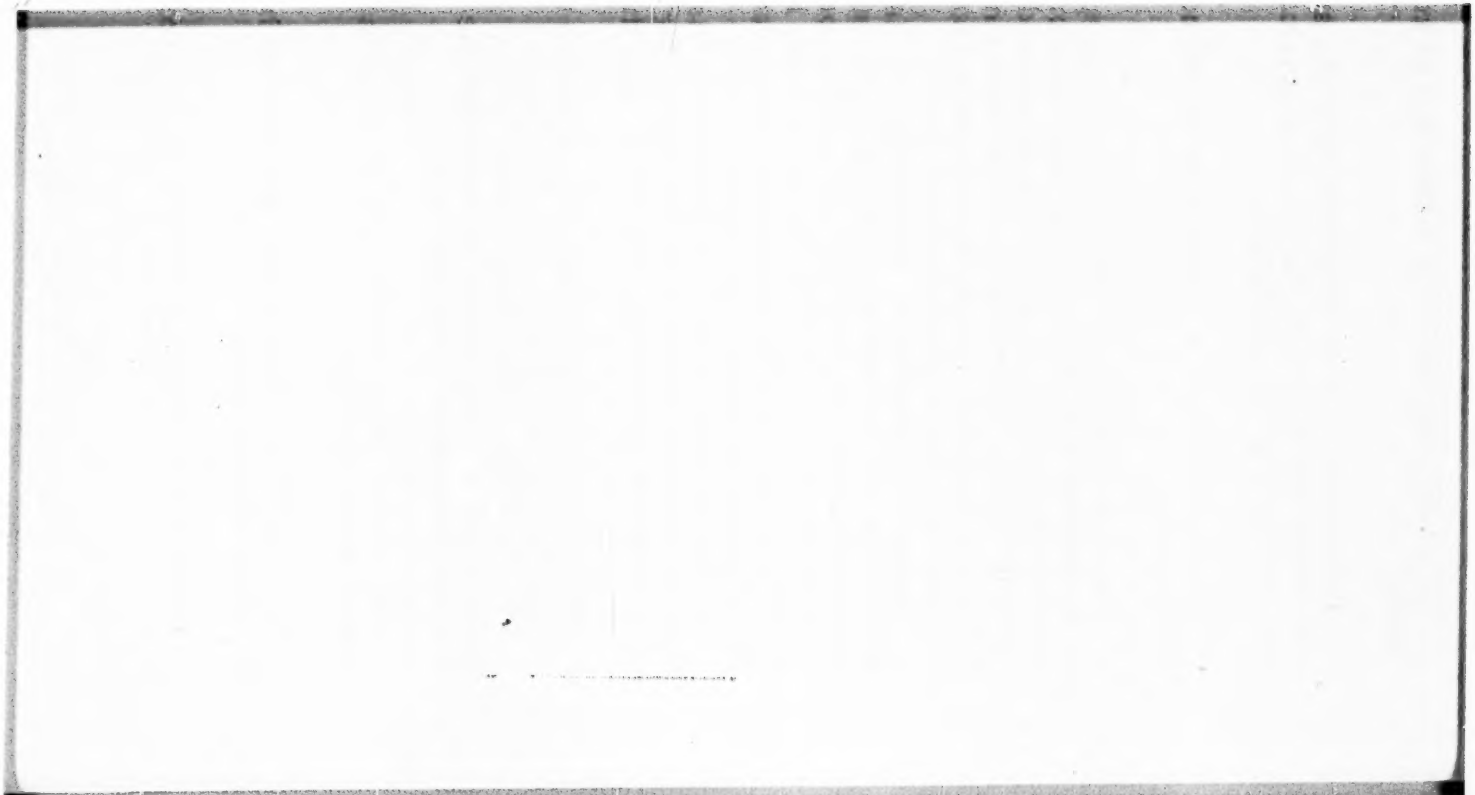
THE COURT: It has a high corroborative value.

MR. LAROSA: That was a robbery case. The question was whether or not that man was the man who robbed somebody, not this case.

MR. LITTLEFIELD: You are not going to concede this was the man?

MR. LAROSA: He is a man who testified he met him three or four times.

THE COURT: Except there has been a strong



impeachment based on motive and so on.

MR. LAROSA: There always is. That does not allow a man to introduce --

THE COURT: I am going to allow it on that theory, that this is a special situation, because of the obvious attack on both the credibility and the ability to recall of this witness Pastou.

MR. LAROSA: Note my objection.

THE COURT: I have your objection noted.
(In open court.)

Q. Could you describe what happened, Agent Pavlick?

A. Yes. Toward the latter part of November, 1972, Agent Levine and myself took Pastou out to an area in Brooklyn in attempt to locate a cheese shop.

Pastou had given us certain leads of what he remembered where this cheese shop was located. We went to the vicinity of an elevated subway, and around Avenue U, where Pastou pointed out the Eagle Cheese Company to us as the place that he had mentioned to us in his statement.

On the following day, Agents Coleman, Levine and myself, again with Pastou, went out to the area of the Eagle Cheese Company, Agent Coleman had got out of the vehicle.

As we were driving around the block, I think it was the second time, Pastou indicated to me that he saw the owner of the cheese shop standing in the window. We again circled the block and we saw Mr. Casamento standing in the window.

Q. Do you see in the courtroom today the man that Mr. Pastou pointed out?

A. Yes, sir, I do.

Q. Could you point to the man that you so indicated?

A. He's the gentleman seated next -- seated in the second table with the glasses and the gray suit.

Q. In addition, had you an opportunity previously to show a collection of photographs to Mr. Pastou?

MR. LAROSA: Objection.

THE COURT: Overruled.

A. Yes, I did.

Q. Approximately how many photographs had you shown him?

A. Over a hundred photographs. I don't know exactly, sir.

Q. At that time you did not know who the man was in question; is that correct.

A. No, I did not.

Q. Was Pastou able to identify any of those photographs as the man to whom he had sold the heroin?

A. No, sir, he did not.

Q. Could you generally describe the kinds of faces that were included in the --

MR. LAROSA: I object to that.

THE COURT: Yes, that is going a little far.

MR. LAROSA: Particularly since I have not seen the photographs.

THE COURT: Ask him the question, was there a picture of the defendant Casamento in the group that he failed to identify.

THE WITNESS: There was no picture of Casamento in that group, your Honor.

THE COURT: All right.

Q. Immediately after this visit to the store with Pastou, did you go anywhere else with him?

A. Yes. The second visit, when Agents Coleman, Levine and myself were with Pastou, we attempted to locate a phone booth in which Pastou stated he made a phone call to South America. On East 3rd Street and Kings Highway, Pastou did find a set of phone booths where he did make that phone call.

Q. Where are they, near any particular kind of store?

A. Near a Carvel icecream store.

THE COURT: East 3rd and where?

THE WITNESS: Kings Highway in Brooklyn, your Honor.

MR. LITTLEFIELD: No further questions."

The prosecutor used Pastou's prior consistent statements to great advantage in arguing Pastou's credibility to the jury. The prosecutor stated in summation:

" And then in or about the month of September, John Doe also known as Frank, and co-conspirator Claude Pastou placed a telephone call from New York, New York to Brazil and spoke with Michel Nicoli, the defendant. And that is the telephone call which you have heard about. And again, at the time that the indictment was prepared, as Mr. Pastou explained, he remebered that that other person who came into the cheese store, his name was Frank. Later it came back to him that his name was Carlos.

" You may find that if Pastou was trying to make a consistent story all the way through, he would have stayed with Frank. The government did not know who he was. But because he was being truthful, as it came to his mind, as he could put together these events some two years ago, more than that, it came to his mind that it was Carlos after the telephone call. So he said Carlos. He did not try to hide that he first said Frank. That would be the easy thing to do. He said, no, now I remember it's Carlos.

" You remember back two years ago as to a series of events that took place over six months detail by detail. You can see how carefully Pastou is now able to put it all together detail by detail."

****

" With respect to Pastou's identification, let us just go over how it took place. First, after telling the agents about the cheese shop, hewas shown a whole

"slew of photographs, about a hundred photographs. Agent Pavlick said Pastou did not identify any of them as being the man with the heroin, the man that sold him the heroin. Why not? Because Casamento's picture was not in that group.

" Again, if he wanted to please the government, he could have picked any one of those hundred but he did not.

" Then, Pastou then told the agents again, and it was reported in the statement, Government's Exhibit 16, he delivered it to the first man, the manager of the cheese store. Then you heard that they had shown photographs of cheese stores in Brooklyn to Pastou to see if he would recognize it. Well, again, if he was trying to please the government, wouldn't he have said "Yes, that's it"? He did not know they were eventually going to be able to take him out there. But no, he did not recognize it because the Eagle Cheese Company was not in the pictures.

" And then they went out to Brooklyn and all of the facts that Pastou had said came to be true about this cheese shop. The el, the bar, the car, the big window, all of the machines in the back. Everything came true.

" Then Pastou appeared before the grand jury on three separate occasions and each one of these details again

about the cheese store made the identification positive, absolute. And finally grand jury appearance, the picture of Casamento was identified."

We believe the above circumstances fall within the ambit of the principle announced by this court in United States v. Sherman, 171 F. 2d 619 (2Circ., 1948).

In that case the appellant Sherman was convicted of conspiracy and theft of goods from an interstate shipment. The pertinent evidence at the trial came from an accomplice named Oliva who testified as a witness for the government.

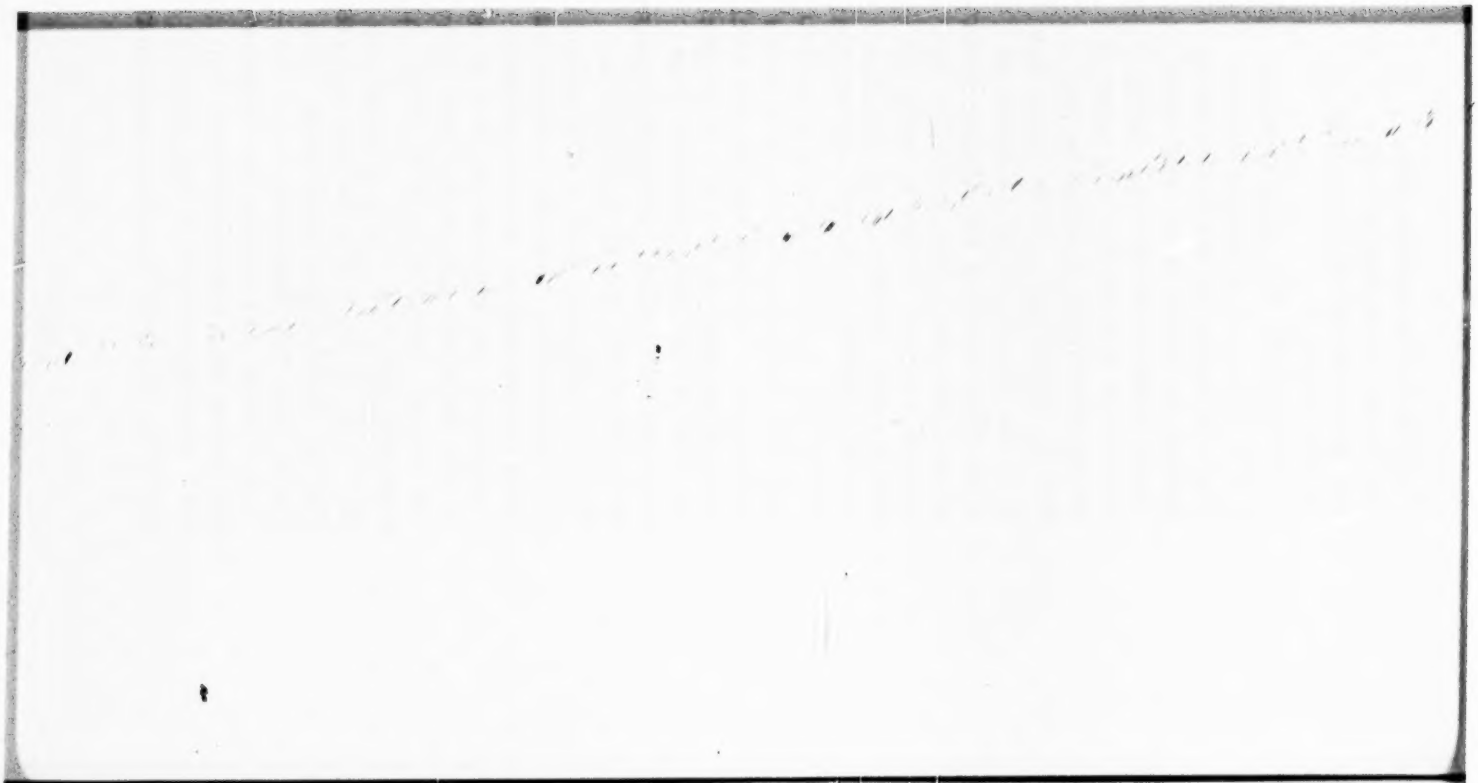
Chief Judge Learned Hand, discussing the facts and the applicable principles of law said at pages 621-622:

"***we should affirm Sherman's conviction, were it not for the admission of the statement that we have mentioned, which got into the case in the following way. After his arrest Oliva made a written statement to an officer of the Federal Bureau of Investigation, in which he didnot mention Sherman as being connected with the transaction at al; and said that it was Whelan who had been the driver of the truck. At the trial, however, he testified, not only that Sherman was a party to the theft, but that it was he who drove the truck. Sherman put in the written statement to impeach this testimony; and to break the force of the impeachment the judge allowed the prosecution to get before the jury part of the contents of a second written statement, made by Oliva to an

"officer a few weeks after the first, in which he told the story as he had testified on the stand.

" Concededly the second statement was not competent unless the admission of the impeaching statement made it so, for when Oliva made it he had the same motive to fabricate - the hope of lenity-that he had while on the stand. Rationally, it is true, the fact that he changed his story so soon after making the contradictory statement, may have added to the persuasiveness of his testimony; and for that matter most persons should probably consider any earlier consistent account, in some measure at least, confirmatory of a witness's testimony. The reason for its exclusion is because it has not been made on oath rather than because it has no probative value, although courts have often spoken as though it had none. However, such a statement is as incompetent when the witness has been impeached by an inconsistent statement, as when he has not been. So the Supreme Court decided many years ago, and although the point has apparently never come up again in that court, the lower federal courts have several times applied or recognized the doctrine.

" It is true that, when the witness's testimony was not impeached, but only 'aspersed' by the defendant's counsel, we held that the admission



"of such a corroboratory statement was harmless error, but we should scarcely have warrant for doing so here. Sherman's connection with the stealing of the truck was of course crucial under the first count, and nearly so under the third. Oliva's failure to include him in his first version might well have thrown doubt upon his later testimony; and, as we have just said, his early correction of that version was, rationally, not an inconsiderable circumstance. The prosecutor certainly thought so, for he used it in summing up the case to the jury. We cannot be certain that it made no difference in the verdict, and Sherman's conviction must be reversed and the cause remanded as to him."

At bar we have a virtually identical pattern. After his arrest, Pastou gave a sworn statement in which he indicated it was Carlos, not appellant, to whom he delivered the heroin. The very critical variance from Pastou's in-court testimony was improperly bolstered by allowing evidence of his earlier consistent statements orally to Agent Pavlick after his arrest when he had the same motive to falsify that he had while on the witness stand during the trial.

In the same vein, the trial court improperly permitted the prosecutor to elicit on re-direct examination of Pastou the following over appellant's objection:

"Q. Then what happened?

A. One day I went in a car with two

"agents and effective I had made a mistake with the letters of the street, that is to say, the streets which have letters to name them, and by following the subway there is a street which passes under the subway and I found the cheese store, Mr. Casamento's cheese store, and just at that time Mr. Casamento was in the store but in front of the door and I recognized Mr. Casamento.

Q. Did you tell the agents that this was the cheese store that you delivered -- this this was the cheese store where you had met Mr. Casamento?

MR. LAROSA: Note my objection, please.

A. I recognize the cheese store and at the same time there was Mr. Casamento who was in the store but in front of the door, and I told the agents, 'This is the store and this is Mr. Casamento to whom I delivered the merchandise.'"

It is therefore respectfully submitted that the erroneous admission of Pastou's prior consistent statements requires the granting of a new trial in order that the credibility of Pastou (the only witness who directly implicated appellant*) could be passed upon fairly by a jury.

*The critical factor of Pastou's credibility is evident from the Court's charge to the jury: "unless you believe the testimony of the witness Pastou, you must acquit the defendant, Casamento".

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT BELOW SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE ORDERED

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Appellant

WILLIAM SONENSHINE, ESQ.
Of Counsel

APENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 22nd day of March, one thousand nine hundred and seventy four.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-against- 73-2736

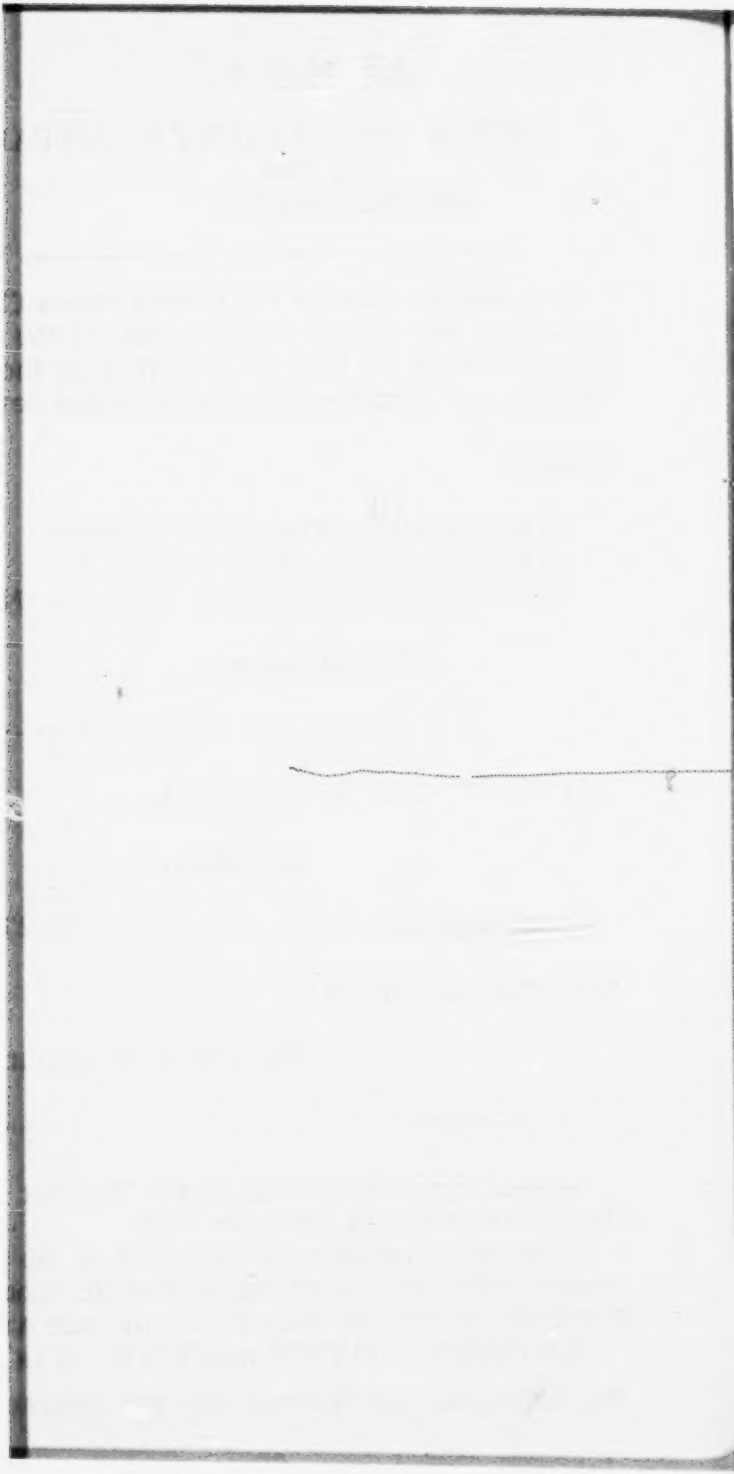
PHILIPO CASAMENTO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby order ed, adjudged, and decreed that the judgment of said



District Court be and it hereby is affirmed. The claim of insufficiency of evidence is frivolous in view, inter alia, of the substantial amount of cash transferred by appellant, the large amount of heroin received by him and the furtive manner of the transfer. The claim of error concerning a prior consistent identification of appellant is without merit. In any event, the error, if any, was harmless.

Leonard P. Moore

Wilfred Feinberg

William H. Mulligan
U. S. C. J.J.

APPENDIX B

21 U. S. C. §841:

§841. Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U. S. C. §952:

§952. Importation of controlled substances - Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter,

21 U. S. C. §960:

§960. Prohibited acts A - Unlawful acts

(a) Any person who-

(1) contrary to section 952, 953 or 957 of this title, knowingly or intentionally imports or exports a controlled substance,